Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection	)	WC Docket No. 05-271
in the Broadband Era	)	
	)	

Comments of COMPTEL

COMPTEL, by its attorney, hereby respectfully submits its comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM).[1] Through its *Notice*, the Commission asks for assistance in developing a "framework for consumer protection" that meets the "consumer protection objectives in the Act."[2] There is no question that the issues cited by the Commission in its brief *Notice* are vitally important to protection of

[1] COMPTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTEL advances its member's business through policy advocacy and through education, networking and trade shows. COMPTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTEL members share a common objective: advancing communications through innovation and open networks.

[2] *Notice* at ¶ 146.

consumers.[3] In the Communications Act, as amended, Congress provided the Commission powerful tools to protect consumers against anticompetitive behavior by common carriers. The Commission must recognize that its recent decisions eliminating the application of Title II provisions to broadband Internet access services will force Congress to revisit consumer protection issues and, in the end, pass new laws to fill the void left by the Commission. COMPTEL urges the Commission to take immediate steps to ensure that current gaps in consumer protection rules are filled.

The Commission appended its *Notice* to an order – the *Wireline Broadband Internet Access Order* – in which it eliminated the application of numerous statutory consumer protections to incumbent LEC broadband services. The answer to the Commission's Notice is actually quite simple: Title II of the Communications Act, as amended, already provides all the consumer protection provisions on which the Commission seeks comment.[4] Congress fully intended that the Commission exercise its Title II authority, including forbearance authority pursuant to section 10 of the Act, to ensure that the appropriate regulatory scheme for broadband providers sufficiently

[3] The Commission asks specifically about customer proprietary network information (CPNI), slamming, truth-in-billing, network outage reporting, section 214 discontinuance, section 254(g) rate averaging, and federal and state involvement. Notice at ¶¶148-58.

[4] It is important to note that for every question raised in the Commission's *Notice* regarding consumer protections, a Title II statutory provision or an FCC rule implementing a provision of Title II already exists. *See* 47 U.S.C. § 222 (customer proprietary network information); 47 U.S.C. § 258, 47 CFR § 64.1140 (slamming); 47 CFR § 64.2401 (truth-in-billing); 47 CFR § 63.100(a)-(e) (network outage reporting) 47 U.S.C. § 214, 47 CFR §§ 63.60 *et seq.* (service discontinuance); 47 U.S.C. § 254(g) (rate averaging); and 47 U.S.C. § 253(b) (permitting state authorities to adopt requirements necessary to "protect the public safety and welfare). Before the FCC adopted the *Wireline Broadband Internet Access Order*, there was no question that these provisions all applied to wireline broadband services.

protected consumers. As set out in greater detail below, the Commission should reinstate the application of Title II to the wireline broadband Internet access services at issue in this docket. Indeed, given the potential limitations of the Commission's Title I authority, any other pathway to consumer protection invites continued litigation over the Commission's authority to protect consumers.

In the *Wireline Broadband Internet Access Order*, the Commission wiped out the application of statutory provisions that Congress put in place over 75 years ago to protect consumers, and replaced them only with a list of four non-enforceable principles, which Chairman Martin took pains to emphasize "do not establish rules nor are they enforceable documents."[5] Since that time, Chairman Martin has also made clear that he does not intend to adopt any consumer protection rules related to incumbent LEC broadband services.[6] In the brief Notice of Proposed Rulemaking (*Notice*) appended to the *Wireline Broadband Internet Access Order*, the Commission suggests that it could, at some point in the future, use its Title I authority to adopt rules to replace the Title II statutory regime that it eliminated as to

[5] *See* "Chairman Kevin J. Martin Comments on Commission Policy Statement," Press Statement, Dec. 5, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf. *Cf* "Phone Companies Set Off A Battle Over Internet Fees," Wall Street Journal, January 6, 2005, A1 ("Large phone companies, setting the stage for a big battle ahead, hope to start charging Google Inc., Vonage Holdings Corp. and other Internet content providers for high-quality delivery of music, movies and the like over their telecommunications networks.").

[6] *See* "No Action Needed Now on Net Neutrality-FCC chief," Reuters, Dec. 14, 2005 ("'I'm hesitant to adopt rules that would prevent anti-competitive behavior where there hasn't been significant evidence of a problem,' Martin said at a conference luncheon by Comptel, a group representing competitive telephone carriers.").

wireline broadband Internet access services. But since the Commission adopted the *Wireline Broadband Internet Access Order*, the Commission's Title I authority has been called into serious question by the D.C. Circuit.[7] Indeed, having removed wireline broadband Internet access services from Title II of the Act, where Congress clearly intended them to be regulated, the Commission's use of Title I authority to reach such services would be particularly questionable.[8] As such, consumers are best served if the Commission uses its existing, unquestioned Title II authority to address the important issues raised in the Commission's Notice.

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[7] *See American Library Assoc. v. Motion Picture Assoc. of America*, No. 04-1037, at 18 (D.C. Cir. 2005) (rejecting Commission exercise of Title I authority as "*ultra vires"* because "the FCC's interpretation of its ancillary jurisdiction reaches well beyond the agency's delegated authority under the Communications Act").

[8] *See FCC v. Midwest Video,* 440 U.S. 689 (1979). In *Midwest Video*, the Court noted that "as the Commission has held, cable systems otherwise 'are not common carriers within the meaning of the Act.'" *Id.* at 702 n.11. As such, the Court reversed the Commission's decision to impose common carrier-like obligations on cable systems. *Id.* at 705. Although the Court had in the past approved of the Commission's exercise of ancillary jurisdiction in *Southwestern Cable* and in *Midwest Video I*, the Court here noted that "[t]hough the lack of congressional guidance has in the past led us to defer -- albeit cautiously -- to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited." *Id.* at 708 (*citing United States v. Southwestern Cable Co.*, 392 U.S 157, 178 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring). In the broadband arena, Congress clearly intended that the Commission utilize its Title II authority to regulate wireline broadband Internet access services – as indeed the Commission did for the three decades from the initiation of the *Computer Inquiry* proceeding through the adoption of the *Wireline Broadband Internet Access Order*. Much as the Court examined Congressional pronouncements in *Midwest Video* and *American Library Association* in finding the Commission's exercise of Title I authority invalid, the Court would likely examine Congress' (and the FCC's) clear recognition that Title II applied to wireline broadband Internet access services and query why a radical change of course from Title II to Title I was appropriate,. Because Congress expressly subjected broadband services to Title II, the Court might have a hard time concluding that Congress would authorize the FCC to ignore Title II and instead attempt to subject such services to Title I.

COMPTEL is concerned that the Commission may not take the necessary quick action to adopt additional consumer protections. Indeed, at oral argument just last week before the Eighth Circuit, counsel for the Commission conceded as much regarding such core consumer protection issues as "slamming" and "cramming," noting that the Commission not only had not adopted such rules to replace those eliminated in the *Wireline Broadband Internet Access Order,* but the Commission may in the future take further steps to preempt the states from doing so.[9] COMPTEL urges the Commission to request an immediate voluntary remand[10] from the U.S. Court of Appeals for the Third Circuit of the pending appeal of the Commission's *Wireline Broadband Internet Access Order*.[11] A voluntary remand will afford the Commission the opportunity to reinstate vital consumer protections, as discussed in greater detail below, without the risk of relying on the Commission's questionable ancillary authority. Because the Commission's actions in the *Wireline Broadband Internet Access Order* eliminated numerous crucial consumer protections, the fact that the Commission will likely lose on appeal and be forced to reinstate these rules

[9] *See* "Extent of State Preemption At Issue in VoIP Case," Telecommunications Reports Daily, Jan. 12, 2005 (reporting that counsel for FCC told the court that the FCC had not adopted rules regarding slamming and cramming but that the FCC "could decide in the future whether to preempt states in that area.").

[10] *See, e.g. Southwestern Bell v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993) (noting court's decision to grant FCC request for voluntary remand while appeal was still pending after Commission represented that it was necessary "to permit the FCC to give further consideration to the matters addressed in the Commission's orders, including the ultimate resolution of this case.").

[11] *In re Earthlink Inc. v. FCC*, No-05-5153 (3rd Cir., filed Nov. 23, 2005). Other petitions for review of the *Wireline Broadband Internet Access Order* are also pending.

on remand still leaves an untenable void with no rules in place. The Commission should act more quickly to reinstate these vital consumer protections.

In the *Wireline Broadband Internet Access Order,* the Commission eliminated common carrier regulation of incumbent LEC broadband services, thereby removing the statutory obligation to provide service in a "just and reasonable" manner.[12] The Commission concluded that such legal requirements were not necessary to prevent incumbent LECs from blocking access to unaffiliated content or service providers, because the Commission would take decisive enforcement action should such blocking occur.[13] But when an incumbent LEC blocked access of a nonaffiliated VoIP provider, rather than take enforcement action, the Commission settled its investigation with no finding of wrongdoing.[14] In the consent decree that closed the investigation into the incumbent LEC's practices, the Commission disclosed that "[t]he Investigation was undertaken pursuant to sections 4(i), 4(j), 218, and 403 of the Communications Act."[15]

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[12] 47 U.S.C. § 201.

[13] *Wireline Broadband Internet Access Order* at ¶ 145 (stating that "we will monitor all consumer-related problems arising in this market and take appropriate enforcement action where necessary."). Notably, the Commission did not cite any statutory authority or provisions of its own rules that it would use to take such enforcement action.

[14] In the Matter of Madison River Communications, LLC and affiliated companies, Order, DA 05-543 (rel. Mar. 3, 2005) (*Madison River*).

[15] *Madison River* at ¶ 1.

In the *Wireline Broadband Internet Access Order* adopted six months later, the Commission removed incumbent LEC broadband Internet access services from Title II of the Act. In so doing, the Commission removed the very statutory authority that it had used to investigate consumer harms. After eliminating its statutory oversight of broadband services, the Commission then suggested that it would "monitor all consumer-related problems arising in this market and take appropriate enforcement action where necessary."[16] In the instant *Notice*, the Commission recognizes that it has "a duty to ensure that the consumer protection objectives in the Act are met."[17] But the Commission removed the very provisions that Congress expressly put in place to protect consumers.

Other examples abound. In another recent decision, the Commission preempted several state commission rulings that had required, pursuant to state consumer protection laws, the Bell companies to end an unlawful practice of requiring consumers to purchase voice service in order to access broadband data service from the Bell company. Traditional Bell company practices of "tying" together broadband DSL services and Bell company phone service were challenged by consumers, competing carriers, and state government officials in numerous state regulatory proceedings. Several state commissions exercised their consumer protection jurisdiction to prevent Bell

[16] *Wireline Broadband Internet Access Order* at ¶ 145.

[17] *Notice* at ¶ 146.

companies from forcing customers seeking to purchase broadband DSL services to also purchase local exchange service that they may not want or need.

Unfortunately, the Commission's response to these pro-consumer state actions was to preempt the state commission decisions that barred the Bell companies from unlawfully tying together separate products that consumers might not want.[18] Concluding that these state commission consumer protection actions were "inconsistent with and substantially prevent the implementation of federal unbundling rules and policies developed by the Commission in the Triennial Review Order," the Commission preempted the states.[19] Put another way, the Commission concluded that the removal of unbundling obligations, massively scaling back the possibility of competitive entry against the Bells, were more important than protecting consumers against unlawful tying.[20] Not only did the Commission itself refuse to take enforcement action against the Bells, it blocked those state authorities that

[18] In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, Memorandum Opinion and Order and Notice of Inquiry, FCC No. 05-78 (rel. Mar. 5, 2005) (BellSouth Declaratory Ruling) (preempting decisions of the state commissions of Florida, Kentucky, Louisiana and Georgia that allowed consumers to purchase Bell DSL service and purchase telephone service from another carrier).

[19] BellSouth Declaratory Ruling at ¶ 17.

[20] BellSouth Declaratory Ruling at ¶ 30 (concluding that "these state requirements undermine the effectiveness of the incentives for deployment" established by the Commission in the *Triennial Review Order* and *Triennial Review Remand Order*).

found the Bell actions unlawful based on their independent investigations pursuant to state law.

In another rejection of congressionally-implemented consumer protection measures, in 2004 the Commission preempted state commissions that had ordered VoIP providers to ensure that their service offerings complied with state 911 requirements. Certain state commissions had exercised their core consumer protection jurisdiction to require VoIP providers to protect the public by providing access to 911 services and following other public safety requirements of state law. The Commission preempted such state action, stripping the state commissions of any authority to protect their citizenry, and overturning those state commissions that had required VoIP providers to ensure their customers could access 911 capabilities.[21] But in a separate proceeding less than one year later, the Commission noted that "we are, at the same time, aware of our obligation to promote 'safety of life and property'"– and the quickly adopted rules requiring VoIP providers to provide 911 access.[22] Notwithstanding the Commission's statement that it was addressing a new "serious problem," the Commission in fact created the problem itself when it barred the state commissions from

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[21] Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22405 (2004) (Vonage Order), appeal pending, National Ass'n of State Util. Consumer Advocates v. FCC, No. 05-71238, (9th Cir. filed Feb. 22, 2005).

[22] In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking , FCC 05-116 (rel. June 3, 2005), at ¶ 4, *quoting* 47 U.S.C. § 151.

imposing 911 obligations in the first instance.[23] In the name of "deregulating" broadband services – removing them from the provisions of the Communications Act – the Commission created a regulatory vacuum that endangered American lives by denying the state commissions authority to regulate 911 access, and at the same time refusing until much later to address it at the federal level. In the instant rulemaking proceeding, the Commission should avoid the same mistake by quickly reinstating Title II consumer protections for broadband services.

The Commission has also narrowly construed statutory provisions that ensure law enforcement access to crucial broadband facilities and services, which could threaten the protection of the American public from crime and terrorism. By reclassifying broadband services as "information services," the Commission also excused wireline broadband Internet access providers from compliance with legal mandates that permit law enforcement to access telecommunications networks to deter and detect criminal acts, including terrorism.[24] Before the Commission adopted the *Wireline Broadband*

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[23] *See* Statement of Chairman Kevin Martin, IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36, 05-196 ("Today's action seeks to remedy a very serious problem – one quite literally of life or death for the millions of customers that subscribe to VoIP service as a substitute for traditional phone service.").

[24] The Commission apparently adopted the separate CALEA Order because the Department of Justice and Federal Bureau of Investigation insisted that the Commission open a separate proceeding to reverse the Commission's decision to exempt wireline broadband Internet access services from the application of CALEA. *See* Letter from Patrick W. Kelley, Deputy General Counsel, FBI, to John Rogovin, General Counsel, FCC, CC Docket Nos. 97-213, 02-33, 95-20, 98-10, WC Docket Nos. 02-361, 03-45, 03-211, 03-251, and 03-266, dated Jan. 28, 2004, at 1 ("We are requesting that the CALEA rule making be completed prior to the other related but non-CALEA specific broadband proceedings pending before the FCC. Otherwise,

Internet Access Order, wireline broadband Internet access services had unquestionably been subject to the Communications Assistance to Law Enforcement Act (CALEA), as Congress intended them to be in order to protect the public.

But rather than preserve CALEA, the Commission tossed it aside by reclassifying wireline broadband Internet access services as information services, rather than telecommunications services, notwithstanding CALEA's clear exemption of information services from its ambit. In an order released the same day as its *Wireline Broadband Internet Access Order*, the Commission twisted the CALEA statute beyond the breaking point by concluding, notwithstanding the plain language of CALEA, that the statute applied to services that the Commission had that same day declared to be information services. The Commission's action was subject to an immediate multi-party judicial challenge.[25] Should the Commission lose in court, which any rational reading of its decision would indicate it will, the Commission will be forced (as it was with its 911 jurisprudence) to quickly rewrite its rules to protect the public safety as Congress intended – by concluding that broadband services are telecommunications services.

In the instant *Broadband NPRM*, the Commission recognizes that there are numerous other consumer protections that it eliminated without

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the outcome of the non-CALEA broadband proceedings could serve to prejudice the outcome of the CALEA rule making proceeding.").

[25] *See, e.g.,* COMPTEL et al. v. FCC, No. 05-1408 (D.C. Cir., filed Oct. 25, 2005).

regard to the needs of consumers.[26] For example, the Commission acknowledged that customer proprietary network information (CPNI) statutory provisions, which protect the privacy of consumer information, apply only to the provision of a "telecommunications service."[27] Similarly, protections that Congress mandated against unauthorized changes to a subscriber's telephone service – commonly known as "slamming" -- apply only to a "telecommunications carrier."[28] In the *Notice*, the Commission admits that it has eliminated the application of slamming protections and asks whether it should "impose similar requirements" to those congressionally-adopted protections that it eliminated.[29] So too for the Commission's "truth in billing" rules – the Commission acknowledges having received "complaints about the billing practices of broadband Internet access service providers," but its reclassification of wireline Internet access services eliminates the application of its truth in billing rules to such services.[30]

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[26] For example, many congressionally mandated consumer protections apply only to providers of telecommunications services. *See, e.g.,* 47 U.S.C. § 222 (customer privacy); 47 U.S.C. § 225 (services for hearing and speech impaired individuals); 47 U.S.C. § 229 (Communications Assistance for Law Enforcement). In addition, eligibility for many of the inputs competitive providers need from incumbents turns on whether the competitor is providing a telecommunications service. *See, e.g.,* 47 U.S.C. § 251(c)(3) (unbundled network elements); 47 U.S.C. § 251(c)(2) (interconnection); 47 U.S.C. § 251(c)(6) (collocation); 47 U.S.C. § 251(b)(2) (number portability); 47 U.S.C. § 251(b)(3) (dialing parity, operator services, and directory assistance). The Commission must ensure that these important congressionally-mandated goals are not thwarted in any subsequent rulemaking proceedings.

[27] *Notice* at ¶ 148.

[28] 47 U.S.C. § 258(a).

[29] *Notice* at ¶ 151.

[30] *Id.* at ¶ 153.

The Commission fails to seek comment on several other statutory consumer protections that it eliminated in the *Wireline Broadband Internet Access Order*. First and foremost, the Commission asks no questions in the *Notice* about so-called "net neutrality" issues. Because the Commission eliminated the nondiscrimination obligations of Title II, wireline broadband Internet access providers are now able to discriminate against nonaffiliated content and service providers, to the detriment of consumers. But the Commission does not ask for comment on any protections that it should adopt to replace the 75 year old congressionally-mandated consumer protections.

In addition, section 225 of the Act requires common carriers to provide telecommunications relay services for hearing-impaired and speech-impaired members of the disabilities community.[31] Section 255 of the Act requires providers of "telecommunications service" to "ensure that the service is accessible to and usable by individuals with disabilities."[32] Both of those important statutory provisions are applicable to common carrier services, a regulatory classification that, until the Commission issued its *Wireline Broadband Internet Access Order*, included wireline broadband Internet access services. Having exempted those services from statutory provisions that protect the disabilities community, the Commission refuses even to ask any questions in its *Notice* regarding steps it should take to fill the void.

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[31] 47 U.S.C. § 225(b).

[32] 47 U.S.C. § 255(c).

Apart from broadly asserting that the Commission would "exercise our Title I authority" where necessary, the Commission offers no explanation as to how the disabilities community could seek to enforce its statutory rights wireline broadband Internet access services.[33]

COMPTEL also urges the Commission to partner with the Federal Trade Commission (FTC) to explore consumer protection issues that may now fall within the jurisdiction of the FTC. The FTC is authorized by statute to take action against any entities that engage in anticompetitive, deceptive, and unfair commercial practices.[34] But importantly, the FTC is denied authority to take action against any "common carriers subject to the Acts to regulate commerce" that engage in anticompetitive conduct.[35] With the exception of common carriers, and other delineated categories that are not relevant to this proceeding, the FTC is charged by Congress to prevent all other companies "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[36]

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[33] *Broadband Wireline Internet Access Order* at ¶ 121.

[34] *See* 15 U.S.C. § 45(a)(1). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." The FTC also has authority pursuant to sections 3, 7 and 8 of the Clayton Act, 15 U.S.C. §§ 12-27, to prevent unlawful tying contracts, corporate mergers and acquisitions, and interlocking directorates. The Clayton Act was amended by the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. §§ 13, 13b, and 21a, and granted the FTC additional authority to prevent certain specified practices involving discriminatory pricing and product promotion.

[35] 15 U.S.C. § 45(a)(2).

[36] 15 U.S.C. § 45(a)(2).

As noted above, the FCC, in the *Wireline Broadband Internet Access Order*, concluded that wireline broadband Internet access services provided by incumbent LECs are information services, not telecommunications services, reversing the Commission's prior conclusions in numerous proceedings that such services were in fact common carrier services. Because the Commission has removed such broadband Internet access services from classification as common carrier services, the Commission has not only removed its own regulatory authority over these services, it has also removed any obstacle to the FTC's authority over such services.

The FTC has used its consumer and competition protection authority in numerous relevant proceedings.[37] For example, when certain music companies used their control of the music distribution process to artificially inflate consumer prices in the face of nascent technologies that promised alternative means of distribution, the FTC took action to stop it.[38] When a computer company attempted to mislead consumers to prevent them from purchasing new, more innovative products, the FTC stepped in.[39] When

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[37] For example, section 9 of the FTC Act authorizes the FTC to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation" (15 U.S.C. Sec. 49). Any member of the Commission may sign a subpoena, and both members and "examiners" (employees) of the agency may administer oaths, examine witnesses, and receive evidence.

[38] *See, e.g.*, In the Matter of BMG Music, a partnership, d.b.a. "BMG Entertainment," Decision and Order, Docket No. C-3973 (2000) (entering into consent decree to end BMG practices of unlawfully maintaining high retail prices for retail music), available at http://www.ftc.gov/os/2000/09/bmg.do.htm.

[39] *See* In the Matter of Hewlett-Packard Company, Docket No. C-4009, Decision and Order (2001), available at http://www.ftc.gov/os/2001/05/hpdo.pdf.

Intel, the nation's largest manufacturer of computer chips, withheld vital technical information "as a means of coercing licenses to their rival microprocessor technology," the FTC did not hesitate to declare Intel a monopoly and to take decisive action against the company to open the microprocessor market to competition.[40] The FTC has even submitted friend of the court briefs to oppose settlements that it feels do not adequately protect the interests of consumers.[41]

The FCC should also suggest to the FTC that it work with the Department of Justice (DOJ) to assist in protecting consumers against anticompetitive behavior. The FTC and DOJ are currently exploring whether additional consumer protections are necessary, particularly where a single firm engages in anti-competitive conduct. The two agencies are jointly exploring what additional protections may be necessary to prevent consumer harm.[42] The FTC, for example, frequently conducts spot-checks of companies within its jurisdiction to ensure their compliance with consumer protection

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[40] *See* In the Matter of Intel Corporation, Docket No. 9288, Complaint (1999). *See also* Decision and Order, Docket No. 9288, available at http://www.ftc.gov/os/1999/08/intel.do.htm.

[41] *See* Press Release announcing FTC amicus filing in Chavez v. Netflix, Inc., No. CGC-04-434884 (Sup. Court of San Francisco County, Cal.) ("The Commission takes no position on the merits of the underlying suit, but is troubled by a settlement that appears to provide greater benefits to Netflix than to consumers"), available at http://www.ftc.gov/opa/2006/01/fyi0602.htm.

[42] *See* "FTC and DOJ to Host Joint Public Hearings On Single-firm Conduct as Related to Competition," Press Release, Nov. 28, 2005, available at http://www.ftc.gov/opa/2005/11/unilateral.htm.

rules.[43] Where companies conspire to deny benefits to consumers by, for example, agreeing not to compete with each other, the FTC has also taken action.[44] Notably, where the Justice Department concludes that an entity controls bottleneck access to content on the Internet, it has taken action to promote competition.[45] The Justice Department would therefore be an appropriate partner to the FTC in ensuring that broadband consumers are protected against anticompetitive behavior from deregulated network owners.

Beyond the FTC and DOJ, the state attorneys general also take seriously their statutory roles related to consumer protection. For example, the New York State Attorney General has taken numerous steps to protect consumers – even in areas where the FCC has authority to act. For example, the FCC has clear statutory authority and rules designed to prevent fraudulent payola practices in the music industry, and the New York Attorney General conducted an extensive investigation that resulted in

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[43] *See, e.g.,* "FTC Sweep of Tyler, Texas Area Funeral Homes Finds Substantial Compliance with Consumer Protection Law," Press Release, Nov. 23, 2005, available at http://www.ftc.gov/opa/2005/11/funeralsweep2.htm.

[44] *See, e.g.*, "FTC Sues to Stop Anticompetitive Agreement in U.S. Drug Industry," Press Release, Nov. 7, 2005, ("The agreement between Warner Chilcott and Barr is a naked agreement not to compete and to share the resulting profits between a branded drug seller and its only prospective generic competitor.").

[45] *See* "Justice Department Sues National Association of Realtors for Limiting Competition Among Real Estate Brokers: NAR Policy Obstructs Internet-Based Real Estate Brokers from Offering Better Services
And Lower Costs to Consumers," Press Release, Sept. 8, 2005 (announcing DOJ lawsuit against NAR for denying access to Internet-based real estate multiple listing service (MLS) to brokers that offered discounted fees to consumers).

enforcement action against the music industry.[46] When consumers complained about service problems with DirecTV satellite service, the attorneys general of 21 states (including New York) investigated, secured monetary and business practice settlements from DirecTV, and protected consumers.[47] The FCC's practice in response to similar state consumer protection moves in the broadband arena, as noted above, has been to preempt the states in an effort to halt such actions. Going forward, the FCC should partner with, rather than preempt, state commissions and state attorneys general, in order to best protect consumers.

In sum, in response to the instant *Notice* and its request for comment on consumer protection measures, the Commission must change course in order to protect the interests of American consumers. The Commission must reinstate the application of Title II consumer protections to wireline broadband Internet access services, rather than rely on its questionable ancillary authority. Congress clearly intended that Title II requirements were, in the first instance, the best means of protecting consumers. In addition, COMPTEL urges the Commission to partner with other federal agencies and the states to support its consumer protection responsibilities.

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[46] *See* "Commissioner Adelstein Applauds New York Attorney General Payola Settlement With Warner Music," Press Statement of Commissioner Jonathan Adelstein, Nov. 22, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262338A1.pdf ("Attorney General Eliot Spitzer has once again achieved a breakthrough in the effort to combat payola and protect consumers from misleading broadcasts. The FCC needs to act on this evidence and conclude as soon as possible the investigation we are now undertaking.").

[47] *See* "Major Satellite Provider Settles Multi-State Investigation -- DIRECTV Agrees to Pay $5 Million to States Plus Refunds to Consumers," Press Release, Dec. 12, 2005, available at http://www.oag.state.ny.us/press/2005/dec/dec12b_05.html.

Respectfully submitted,

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